

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2001-000031

10/16/2007

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

UNIVERSITY PHYSICIANS INC

D DOUGLAS METCALF

v.

PIMA COUNTY, et al.

ROBERTA S LIVESAY

UNDER ADVISEMENT RULING

(Plaintiff's Application For Attorneys' Fees)

The Court cannot override the determination of the Court of Appeals that Plaintiff did not prevail in the appeal. *University Physicians, Inc. v. Pima County*, 206 Ariz. 63, 69 ¶ 33 (App. 2003). Plaintiff also did not prevail at the Supreme Court level. From neither level did this Court receive an instruction that it could award appellate-level fees to the ultimate prevailing party, an instruction expressly given to the trial courts in *Progressive Classic Ins. Co. v. Bland*, 212 Ariz. 359, 364 ¶ 21 (App. 2006), and *Leo Eisenberg & Co. v. Payson*, 162 Ariz. 529, 535 (1989). Plaintiff therefore cannot be reimbursed for its attorney's fees at any level other than the trial court. A.R.S. § 12-348 limits fees to \$30,000 "at each level of judicial appeal." The Tax Court is a single level, so a maximum of \$30,000 is recoverable for fees.

At the trial level, the County's Objection is contradictory. It argues first, in the context of the award of fees, that Plaintiff prevailed only because of the new legislation and should therefore be denied its fees after the enactment of that statute. Yet in opposition to sanctions, it insists that the subject of the legislation, relief to the afflicted, was only one of three issues, and that there was at least a material issue on each of the other two. In this context, it cites its petition for review in *Volunteer Center of Southern Arizona v. Staples*, 214 Ariz. 36 (App. 2006). But if the then still-pending status of *Volunteer Center* (the Court understands that the Supreme Court has now denied review) left open argument on the charitable use and not for profit elements, then the new law did not completely resolve the issue and Plaintiff is entitled to its fees

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pursuant to A.R.S. § 12-348 for the entire proceeding before this Court. However, the Court is not persuaded that the County acted unreasonably or without substantial justification.

Plaintiff appears to be seeking reimbursement, not only for its attorney's fees in this Court, but for its expenses in lobbying the legislature. While Plaintiff has the right to simultaneously seek relief from two branches of the government, it does not have the right under any statute or rule to recover expenditures incurred outside the judicial system. As to the number of redactions, while work product is protected from compulsory disclosure, the opposing party and the Court must have sufficient information to determine whether the claimed items are in fact compensable, so to the extent necessary to accomplish that, the party seeking reimbursement waives the privilege. *See Ideal Electronic Security Co., Inc. v. International Fidelity Ins. Co.*, 129 F.3d 143, 150-52 (D.C.Cir. 1997). Plaintiff insists that, even if all entries questioned by the County on these two grounds are disapproved, its fees still far exceed the \$30,000 statutory maximum. This is the case, especially considering that Plaintiff is entitled to fees up to a total of \$30,000 in the Tax Court. (The claimed fees at the Tax Court level come to \$134,120, more than quadruple the limit.) Accordingly, there is no reason for an evidentiary hearing.

Therefore, IT IS ORDERED:

1. Plaintiff is awarded \$30,000 in attorneys' fees plus taxable costs of \$3814.10 (the amount sought less the filing fee at the Court of Appeals).
2. Approving the Final Judgment all in accordance with the formal written Final Judgment signed by the Court on October 17, 2007.